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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SOLICITOR
DEC 26 2001

01-1640
(Serial No. 08/567,564)

U.S. PATENT & TRADEMARK OFFICE

IN RE JOHN KOLLAR

Appeal from the United States Patent and Trademark Office, Board of Patent
Appeals and Interferences

REPLY BRIEF
for
Appellant
John Kollar

December 24, 2001

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201 652-8770

AK

REPLY BRIEF

Appellant, previously in Brief, made an altruistic suggestion that the most expeditious and unbiased path to the facts of a § 102(b) on-sale bar is a direct reading and self-interpretation of the unredacted AGREEMENT, **A335-A357**, by the Court. The intent and purpose of the AGREEMENT are logically organized and clearly stated in plain legal language.

A highly recommended second suggestion to the Court for a further detailed description of core facts and legal issues relating to the AGREEMENT and commodity chemical innovation are clearly presented in the first part of Paper 25 **A247-281**, to place this case “in the normal context of its [commodity chemicals in this case] technological development” *General Motors Corp. v. Bendix Aviation Corp.*, 123 F. Supp. 506, 521, 102 USPQ 58, 69 (N.D.Ind. 1954).

Key issues referred to had been categorized for economy of verbiage and convenience.

- I EARNED v SOLD (on-sale) **A248-250**
- II PAYMENTS TO REDOX are EXPERIMENTAL OBLIGATION **A251-254**
- III PRIMER – COMMODITY CHEMICAL INNOVATION **A255-261**
- IV EXPERIMENTAL - SCIENTIFIC EXPERIMENTATION **A261-264**
- V EQUITABILITY IN INNOVATION RISK TAKEN – REWARD EARNED **A264-267**
- VI EXPERIMENTATION EVIDENCE in REQUEST FOR INTERFERENCE **A267-271**
- VII SCOPE and NATURE of the INNOVATION EFFORT **A271-276**
- VIII RESPONSE TO OFT REPEATED BPAI “WORDS & PHRASES” **A277-281**

Citations

A____ Appendix, Br____ Appellant's Brief SBr____ Solicitors Brief RBr____ Reply Brief

REBUTTAL TO SOLICITOR'S ARGUMENT

Appellant will respond to Solicitors Brief, point-by-point in the order presented by Solicitor.

A. Standard of Review

BPAI uses an admittedly low burden of proof "preponderance of evidence" to assert an on-sale bar. **A84-85** BPAI's error is using the low burden of proof that pertains only to the rejection of claims [content] of a patent.

In Supreme Court Justice Stevens' opinion of a unanimous decision in *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67, states verbatim, "We conclude, therefore, that the on-sale bar applies when two conditions are satisfied before the critical date. "First, the product must be the subject of a commercial offer for sale"

The law requires a higher standard "clear and convincing" burden. As Chief Judge Mayer states in *STX v. Brine and Warrior* 48 USPQ2d 1641, 1647 (1998), "... must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell " *Tec Air, Inc. v. Denso Mfg. Mich., Inc.*, 192 F.3d 1353, 1358, 52 USPQ2d 1294, 1296 (Fed. Cir. 1999)

Senior Justice Plager referring to the § 102(b) on-sale bar writes, "... . . . must demonstrate by clear and convincing evidence that "there was a definite sale or offer to sell more than one year", and writes further,

"... . . leaves no room for "activity which does not rise to the level of a formal 'offer' under contract law principles.", and writes further,

"... we must view the evidence in a light most favorable to the [defendant against a 102(b) bar] non-movant; in that light, we are inclined to the view that Group One's [defendant] understanding of the transaction must prevail for purposes of the summary judgment analysis."

Group One, Ltd v Hallmark Cards, Inc., 254 F.3d 1041, 1048, 59 USPQ2d 1121, 1126(Fed. Cir. 2001)

BPAI fails the USPTO's own guidelines in MPEP 2133.03(e)(1) on the "sale" issue. **A363**

Further, BPAI does not even meet its own USPTO guidelines MPEP 2133.03(e)(4) on the "experiment" issue that is an acknowledged exception to the § 102(b) on sale bar. **A371-372**

Appellant argues the on sale assertion must be demonstrated by clear and convincing evidence as required by law under *Pfaff* etc. before secondary considerations of *Pfaff*. **A362**
BPAI has failed to meet this standard by any recognized means including PTO's own manual the MPEP. BPAI has even failed to meet the much lower burden "preponderance of evidence" by asserting that an impossible hypothetical met this standard. **A249**

Indeed, BPAI has only met the unacceptably low "Madison Avenue" television commercial burden of proof, "Trust me, it is so because I say it is so."

Appellant totally agrees with Solicitor and the law, that experimental must be analyzed on the totality of the surrounding circumstances. Which Solicitor and BPAI totally fails to do.

Appellant asserts that application of the law must be interpreted against a comparable precedent not against some vague shadow and inappropriate standard. This BPAI has not done. Standards must be applied "in the normal context of its [commodity chemicals in this case]

technological development" *General Motors Corp. v. Bendix Aviation Corp.*, 123 F. Supp. 506, 521, 102 USPQ 58, 69 (N.D.Ind. 1954).

Both Celanese and Appellant are well experienced and qualified in the entire process of commodity chemical innovation and its normal technological development. A247, A275, A301 BPAI's experience in "commodity chemical" technological development, based on BPAI's cumulative USPTO based CV is totally absent. A360, A364-366

B. The Claims of the '564 Application Are Barred From Patentability

Under § 102(b) By Appellant's Agreement With Celanese

BPAI and now Solicitor have NOT met the requirement of "clear and convincing evidence that there was a definite sale or offer to sell", which renders all else legally superfluous.

Appellant argues that Solicitor is additionally wrong on at least two counts in asserting that reduction to practice is sufficient to satisfy the second condition [of *Pfaff*].

First, it is obvious that an invention cannot be perfected if it does not exist and has not answered its intended purpose, unless it has already been reduced to practice, however rudimentary or undeveloped. The law manifests such recognition in the following.

"A use or sale is experimental for purposes of section § 102(b) if it represents a bona fide effort to perfect the invention or to ascertain whether it will answer its intended purpose.... If any commercial exploitation does occur, it must be merely incidental to the primary purpose of the experimentation to perfect the invention." *LaBounty Mfg. v. United States International*

Trade Commission, 958 F.2d 1066, 1071, 22 USPQ2d 1025, 1028 (Fed. Cir. 1992), Pennwalt Corp. v. Akzona Inc., 740 F.2d 1573, 1581, 222 USPQ 833, 838 (Fed. Cir. 1984)).

Second, as regards the "invention" which must be ready for patenting, Justice Stevens states the following in *Pfaff*, "The word "invention" must refer to a concept that is complete, rather than merely one that is "substantially complete.""

Appellant asserts the application of the law must be interpreted against a comparable precedent "in the normal context of its technological development" *GM v. Bendix*.

Appellant states that a critical intended purpose stated in 1.1 E of the AGREEMENT A336 was not satisfied and indeed could not until a great amount of additional experimental effort. Solicitor's assertion that it was ready for patenting is wrong based on technical, practical and legal grounds. The "normal context of technological development" for a complex commodity chemical process is based on priorities. *GM v Bendix A268-270*

1. The Claimed Process Was The Subject of a Commercial Offer For Sale Before the Critical Date

Solicitor fails to cite many of the most pertinent opinions in, *Group One, Ltd v Hallmark Cards, Inc.*, 254 F.3d 1041, 1048, 59 USPQ2d 1121, 1126(Fed. Cir. 2001)

Therein, referring to *Pfaff*, Senior Justice Plager states, "Though the Court did not elaborate on what was meant by "a commercial offer for sale"—the issue not being directly presented the language used strongly suggests that the offer must meet the level of an offer for sale in the contract sense, one that would be understood as such in the commercial community. Such a

reading leaves no room for "activity which does not rise to the level of a formal 'offer' under contract law principles."

Referring to the § 102(b) on sale bar, Senior Justice Plager writes, "... . . . must demonstrate by clear and convincing evidence that "there was a definite sale or offer to sell more than one year"

" . . . we must view the evidence in a light most favorable to the non-movant; in that light, we are inclined to the view that Group One's understanding of the transaction must prevail for purposes of the summary judgment analysis." *Group One, Ltd v Hallmark Cards, Inc.*, 254 F.3d 1041, 1048, 59 USPQ2d 1121, 1126(Fed. Cir. 2001)

Note! Group One was the non-movant in the summary judgment where Hallmark sought to invalidate Group One patents for an on-sale §102 (b) bar.

Judge Lourie adds in the last seven paragraphs dedicated to the on-sale and license issue, "We have held in Mas-Hamilton that providing a machine to a potential customer with an offer to convey "production rights" or the "right to market the invention" does not constitute an offer to sell the invention that violates the on-sale bar. Mas-Hamilton Group v. LaGard, Inc., 156 F.3d 1206, 1217, 48 USPQ2d 1010, 1019 (Fed. Cir. 1998). That is because a license under a patent is not usually a sale of the patented product, and the statute bars a sale, not a license. A license is analogous to granting or waiving rights under the patent, which is distinct from selling the machine covered by the patent.

Appellant points out that the Celanese Agreement is an R&D cooperation with well-defined cross-licensing terms in Section 5 (A350-353). "5.1 During the Commercial Phase, Celanese shall have a license under Redox Patents" **A350**

Also from *Group One v Hallmark*, "There is precedent in this court to the effect that a sale of rights in a patent, as distinct from a sale of the invention itself, is not within the scope of the statute, and thus does not implicate the on-sale bar. See Mas-Hamilton Group v. LaGard, Inc., 156 F.3d 1206, 1216, 48 USPQ2d 1010, 1019 (Fed. Cir. 1998) (citing Moleculon Research Corp. v. CBS, Inc., 793 F.2d 1261, 1267, 229 USPQ 805, 809 (Fed. Cir. 1986))."

Prior to the Group One ruling the PTO's own manual states in MPEP 2133.03 (b), Sec I, Part D states, "An assignment or sale of the rights, such as patent rights, in the invention is not a sale of 'the invention' within the meaning of section 102(b)." The sale must involve the delivery of the physical invention itself. *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1265, 229 USPQ 805, 809 (Fed. Cir. 1986).

Consider, why Examiner, BPAI and Solicitor dismiss the Appellant cited *Moleculon v CBS* since mid 1998 even though it emanates directly from the USPTO's own manual. Impartiality!

Appellant argues *Moleculon v. CBS* in Appeal to Board Brief before Examiner **A215-216**

Examiner ignores MPEP on *Moleculon v. CBS*

Examine in Examiner's Answer rejects *Moleculon v. CBS*. **A 232-233**

Appellant advises Examiner in Appeal to Board Brief of a comparable circumstance issue put to USPTO for a favorable ruling in Bayer-Redox case, citing *Moleculon v. CBS* **A211 part 7**

Examiner rejects USPTO ruling and *Moleculon v. CBS*. A 235

Appellant cites Examiner's errors in Bayer-Redox rulings in Reply Brief. A244

BPAI ignores MPEP on *Moleculon v. CBS*

BPAI rejects *Moleculon v. CBS* and all of the above. A037-039

Solicitor ignores MPEP on *Moleculon v. CBS*

Solicitor ignores all of the above including *Group One v Hallmark* on *Moleculon v. CBS*

a. The Celanese Agreement Encompassed The Process

Described in Representative Claim 1

(i) **Representative Claim 1 Interpreted**

(ii) **The Scope of the Celanese Agreement**

b. The Celanese Agreement Was a Commercial Offer For Sale

There is a plethora of empty fill, posturing and irrelevancy from the start to mid page 32.

Thereafter, Solicitor becomes ensnarled in their own and BPAI's web of lack of comprehension of commodity chemicals and the normal context of commodity chemical technical development. This is the metric which must be applied. *General Motors Corp. v. Bendix Aviation Corp.*, 123 F. Supp. 506, 521, 102 USPQ 58, 69 (N.D.Ind. 1954).

BPAI and now Solicitor, befuddle and confound Appellant with the following from penultimate line on SBr at 32, "And, it is clear from the signed Celanese agreement that regardless of the "R&D Phase" in which Celanese, with the participation of Appellant, was to

experiment with the "commercialization" of the "Technology" if Celanese deemed it necessary, Celanese would acquire commercialization "rights" in the "Technology. (A344-345)."

Solicitor and BPAI before assert from their interpretation of the above that it constituted a sale and a further determination that the AGREEMENT was not experimental.

Appellant thoughtfully ponders, "What in heck is "experiment with commercialization"?" Experimental is exempt from on-sale §102 (b) bar, isn't it?. And from where did BPAI originate "if Celanese deemed it necessary"? This is pure "Harry Potter" fiction. Wizardry!

Appellant briefly addressed this topic on Br at 12 , Br at 13. Further elucidation.

Appellant points out that BPAI has melded at least two components of contention in this nonsense. They are the absolutely impossible BPAI hypothetical of Celanese not doing any contractually obligated R&D (experimental issue) and the specifics of Celanese's experimental cooperative obligations (both experimental and sale issues).

Appellant will grammatically analyze the actual words in the AGREEMENT, which follow, Compare Solicitor/BPAI statement above to the legal contractual obligations following.

2.1 Celanese, with the cooperation of Redox, shall conduct such research and development (R&D) in the Field, and shall pilot such step or steps as Celanese deems advisable, with a goal of achieving, by the end of 5 R&D Years, Celanese approval for a commercial plant in the Field.

"Celanese, with the cooperation of Redox" A cooperation is a working together for a mutual benefit. Shared risk and shared reward. **A264-267** A sale has selfish motivations. Focused arguments are compiled in EARNED v SOLD (on-sale). **A248-250** More evidence of a cooperation shown in **A277-279, A361-364, A370 and A374.**

A368-369, RBr at 3 line 1-4

“Celanese ... shall conduct such research and development (R&D) in the Field,”

This is "NOT AN OPTION". This is an OBLIGATION. Experimental obligations with reasonable specificity for a technological development of this kind are embedded in the AGREEMENT. *GM v Bendix* Focused arguments on the "experimental" facts are compiled in, PAYMENTS TO REDOX are EXPERIMENTAL OBLIGATION A251-252 and EXPERIMENTAL - SCIENTIFIC EXPERIMENTATION A261-264

"Celanese.... shall pilot such step or steps as Celanese deems advisable."

This is optional. Only the decision about whether to pilot a given step/s is optional, as Celanese deems advisable. **A270-271, A273, A280, A366-368** This is the “normal context of technological development” for a complex commodity chemical process. *GM v Bendix*

R&D Years, Celanese approval for a commercial plant in the Field." This is the "normal context for a complex commodity chemical process development. *GM v Bendix* A255-261

Solicitor and BPAI before exhibit a fetish with the word “commercial” or its variants and attempt to demonize the word. Clearly stated in the AGREEMENT “commercialization” is the GOAL. A339, A362 Indeed, commercialization is the ultimate manifestation of “utility”, one

of the two fundamental requirements for obtaining a patent. This point has been repeatedly made by Appellant and ignored by Examiner, BPAI and Solicitor. A214, A247, A255, A296

COMMERCIALIZATION IS NOT A BAD WORD. In the commodity chemical world and probably in most new science fields, it is the goal of all R&D efforts and is indeed the objective of the US Constitution, Art. I Sect. 8, "To promote the Progress of Science and"

COMMERCIALIZATION is the "Progress of Science", the honey upon which the patent system is built, the grounded and "proven beyond doubt" knowledge base that beget new knowledge. With due deference non commercialized patents only attract a small following because they may contain many real world "uncertainties". Commercialized patents attracts a mass following as evinced from the USPTO database on "patent improvements". Knowledge builds on knowledge, especially on the most certain knowledge, which commercialization verifies.

Consider, Examiner's and BPAI's and to a lesser extent Solicitor's unique self serving interpretation of words and incomplete concepts, "always" to the detriment of Appellant. Impartiality! To wit the clearest manifestation is highlighted on A209-212. The absence of impartiality is pervasive throughout these proceedings. As representatives of the Justice System are the USPTO members, acting as judge and juror, not duty bound to impartiality.

What are the duties and responsibilities of the USPTO's Examiner/BPAI/Solicitor? Are they the special protectors of Article I Section 8 of the U.S. Constitution? Are they impartial adjudicators or are they adversaries? Is their responsibility to ARCO, to circle the wagons

around the USPTO or to the U.S. Constitution? Which? Are they lawyers or are they fiction writers? Are they lawyers or are they lexicographer? Are they lawyers or are they wizards?

1. The Process Described in the Celanese Agreement Was Ready For Patenting

Clearly the invention was not complete. **Br at 12 In 6-9** Thereby it did not meet the second prong of *Pfaff*. BPAI's fundamental error derive from their lack of understanding of commodity chemical technological development, the mandatory standard. *GM v Bendix*

A comprehensive understanding of the required standard for this topic is presented in, SCOPE and NATURE of the INNOVATION EFFORT **A271-276**.

C. Appellant Has Failed To Carry His Burden Of Proving That Claim 1 Is Patentable

BPAI failed the first burden of proof required, as stated by Chief Judge Mayer in *STX v Brine and Warrior*, "... must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell" See above on page 2.

1. Appellant's Argument That the Celanese Agreement Falls Under the Experimental Use Exception Must Fail

Solicitor talks all around the issue of the 4 US Patents emanating from the AGREEMENT, but evades responding to the obviousness of the experimental nature of the four US Patents as if the Solicitor is an adversary.

Solicitor fails even to address the additional documentary evidence of experimental improvements in **A174, A175** from the RFI.

Solicitor also fails to acknowledge the obvious. If evidence of one "experimental" meeting with experimental work is shown, dated 2 years 6 months and 21 days after the AGREEMENT, than there must surely have existed more such meetings in the interim, which were not relevant to the RFI. **Br at 8, In 14 to Br at 9, In 9**

BPAI's query recognized this possibility of further meeting and experimental work on **A049**. BPAI chose to ignore the positive response to BPAI query on **A334.1, 334.2**.

Appellant's characterization of US Patents was "intentionally pointed" and not intended to be an absolute and complete definition of a US Patent. Is this a game of semantics? When a US Patents is based on experimental data and efforts is it not experimental? Most US Patents are based on experimental data only.

ARE THESE 4 US PATENTS EXPERIMENT DERIVED OR NOT?

IS THE DOCUMENTARY EVIDENCE IN *A174, A175* EXPERIMENT OR NOT?

DOES *A174, A175* EVINCE OTHER SIMILAR MEETINGS/EFFORT OR NOT?

2. Appellant's Other Arguments Are without Merit

Appellant assessed position on this BPAI panel is fact based on this BPAI panel's USPTO Curriculum Vitae which however contentious is further supported by their obvious failures to apply the standards required by law, "in the normal context of its [commodity chemicals in this

case] technological development" *General Motors Corp. v. Bendix Aviation Corp.*, 123 F. Supp. 506, 521, 102 USPQ 58, 69 (N.D.Ind. 1954).

Appellant has made no such characterization as expressed by Solicitor's words "require much fine tuning". Quite the absolute contrary. **Br at 14, In 15-20**

These experimental improvements are "EXPERIMENTAL" and patentable by USPTO standards. The term "experiment with commercialization" is a § 102(b) on-sale bar oxymoron creation of BPAI and Solicitor. **RBr at 8, In 4-5**

Appellant asks, "What are commercial parameters?" The 4 US Patents? The "meeting" and experimental efforts manifest therein? **A174, A175** The obvious "meetings" and experimental efforts held between the date of the AGREEMENT and dated **A174, A175**.

Solicitor is not correct when stating that Patent law does not differential between different types of inventions. Indeed, patent law differentiates between individual inventions and circumstances surrounding inventions. *Pfaff!* *Pfaff!* *GM v Bendix!*

Solicitor takes a partial and incomplete concept in **SBr at 43, In 10 to 12** and omits the full textural content, in the following 3 sentences to the end of **Br at 7**, dealing with the experimental reality of commodity chemical innovation. "A commercial plant when it fails to meet its intended use, becomes a hugely expensive experimental vehicle or a scrap heap." **A257, A258**

Solicitor continues to beat BPAI's "dead horse" creation, from a contrived, impossible, hypothesis in **SBr at 44, 1st full paragraph**. This hypothesis absolutely fails to meet the initial burden of *Pfaff*, the clear and convincing standards of a sale or offer even to suggest proceeding

toward the further requirements for a § 102(b) on-sale bar required by *Pfaff v. Wells*, *STX v.*

Brine and Warrior and Group One v. Hallmark

Solicitor fails the mandate of Solicitor's own citation of, "Experimental use is a question of law to be analyzed on the totality of the surrounding circumstances." *Tone v. Sysco* **SBr at 24** Solicitor totally fails to analyze the totality. Solicitor fails the experimental issue by ignoring the standards in *GM v Bendix*.

Solicitor like BPAI before continues to apply selective biased fragments rather than the totality of a concept or reasonable modicum thereof to establish a legal position. The law is not constructed nor intended to be interpreted in PR snippets. There is always a context that should be intelligently applied.

Solicitor is way out of line in suggesting that Appellant does not comport with patent policy. Appellant reminds Solicitor of the balance of public interest versus inventor's interest established by law and specifically addressed by Justice Stevens in its totality in *Pfaff*. **Br at 11, last 7 lines**

IV CONCLUSION

The Board and Solicitor have failed to prove a single issue asserted, either by fact or in law.

APPELLANT'S STATEMENT

The Courts have evolved recognition of the comprehensive nature, diversity and types of invention as being so great that they defy simple pigeonhole characterization. Justice Stevens recognizes this complexity by the frequent use of qualified rather than absolute statements.

Different types of inventions do have very different characteristics in progressing the invention to practical utility (commercialization).

Inventions range from the ultra simple which are instantly implemented to the highly complex, extremely difficult, costly and time consuming to bring to practical fruition. The standards of one type of invention cannot be used to judge a different type of invention.

The Supreme Court in *Pfaff* had an easy decision on "ready for patenting" because the Wells' "switch invention" was directly transferable from a simple drawing, probably because it involves no unknowns or uncertain fundamental scientific theory. The direct from drawing to production was "the normal context of the Wells' technological development, since it did not require any research or development, it did not require a working model to be complete nor was there any uncertainty that it would serve (answer) its intended purpose.

Indeed, simple drawings may as in the case of Pfaff be complete and ready for instant commercial use, or sophisticated drawings as in the case of multi component process chemistry inventions may be a mere tool to direct and progress the invention.

Breakthrough, not improvement, inventions in nuclear, aviation, space and comparable science disciplines require not only wildcatting for concepts but most importantly they require the massive support and resources. Indeed, some research projects are so monumental that they can only be achievable with the massive resources of the federal government to merely demonstrate let alone achieve utility.

The application of the law must be interpreted in a total context, preferably against comparable precedents of fact and law, not against some vague and inappropriate standard.

Honorable Justices of the US Court of Appeals for the Federal Circuit:

Appellant respectfully submits this Reply Brief to the United States Court of Appeals for the Federal Circuit for its informed, fair and impartial consideration. Appellant ask that the Court find for the Appellant on the merits of the 35 U.S.C. § 102(b) on-sale issue and directs the BPAI to instantly declare an interference with ACC and declare Appellant as senior party on the prima facie showings that Appellant had disclosed to ACC and of being the first to invent as required by 37 CFR § 1.608.

Respectfully submitted,

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Submitted December 24, 2001

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with Rule 32 (a) (7) (B). Computer generated word count is 4081 words total..

John Kollar

(Pro Se)

John Kollar 12/24/01

(Signature and Date)